

UNITED STATES DISTRICT COURT**EASTERN DISTRICT OF WASHINGTON**

MICAH ISAAC GOODWIN,

Plaintiff,

vs.

CAROLYN W. COLVIN,

Acting Commissioner of Social Security,

Defendant.

No. 2:15-CV-00319-MKD

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

ECF Nos. 18, 21

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 18, 21. The parties consented to proceed before a magistrate judge. ECF No. 9. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff's motion (ECF No. 18) and grants Defendant's motion (ECF No. 21).

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - 1

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district

1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
2 *Id.* An error is harmless “where it is inconsequential to the [ALJ’s] ultimate
3 nondisability determination.” *Id.* at 1115 (quotation and citation omitted). The
4 party appealing the ALJ’s decision generally bears the burden of establishing that
5 it was harmed. *Shineski v. Sanders*, 556 U.S. 396, 409-410 (2009).

6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered “disabled” within
8 the meaning of the Social Security Act. First, the claimant must be “unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months.” 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant’s
13 impairment must be “of such severity that he is not only unable to do his previous
14 work[,] but cannot, considering his age, education, and work experience, engage in
15 any other kind of substantial gainful work which exists in the national economy.”
16 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
19 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner
20 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);

1 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
2 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
3 404.1520(b); 416.920(b).

4 If the claimant is not engaged in substantial gainful activity, the analysis
5 proceeds to step two. At this step, the Commissioner considers the severity of the
6 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
7 claimant suffers from “any impairment or combination of impairments which
8 significantly limits [his or her] physical or mental ability to do basic work
9 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
10 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
11 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
12 §§ 404.1520(c); 416.920(c).

13 At step three, the Commissioner compares the claimant’s impairment to
14 severe impairments recognized by the Commissioner to be so severe as to preclude
15 a person from engaging in substantial gainful activity. 20 C.F.R. §§
16 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
17 severe than one of the enumerated impairments, the Commissioner must find the
18 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

19 If the severity of the claimant’s impairment does not meet or exceed the
20 severity of the enumerated impairments, the Commissioner must pause to assess

1 the claimant's "residual functional capacity." Residual functional capacity (RFC),
2 defined generally as the claimant's ability to perform physical and mental work
3 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
4 404.1545(a)(1); 416.945(a)(1), is relevant to both the fourth and fifth steps of the
5 analysis.

6 At step four, the Commissioner considers whether, in view of the claimant's
7 RFC, the claimant is capable of performing work that he or she has performed in
8 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).
9 If the claimant is capable of performing past relevant work, the Commissioner
10 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).
11 If the claimant is incapable of performing such work, the analysis proceeds to step
12 five.

13 At step five, the Commissioner considers whether, in view of the claimant's
14 RFC, the claimant is capable of performing other work in the national economy.
15 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
16 the Commissioner must also consider vocational factors such as the claimant's age,
17 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);
18 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
19 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
20 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other

1 work, analysis concludes with a finding that the claimant is disabled and is
2 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

3 The claimant bears the burden of proof at steps one through four above.
4 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
5 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
6 capable of performing other work; and (2) such work “exists in significant
7 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.920(c)(2);
8 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

9 **ALJ’S FINDINGS**

10 Plaintiff applied for child’s insurance benefits and supplemental security
11 income benefits, pursuant to Titles II and XVI, respectively, on April 27, 2012,
12 alleging disability since May 11, 2007. Tr. 129-45. Plaintiff’s applications were
13 denied initially, Tr. 83-89, and on reconsideration, Tr. 97-101. Plaintiff appeared
14 at a hearing before an Administrative Law Judge (ALJ) on February 18, 2014. Tr.
15 28-52. On April 11, 2014, the ALJ denied Plaintiff’s claim. Tr. 10-20.

16 At the outset, the ALJ found that Plaintiff met the requirements of the Act
17 with respect to his child’s insurance benefit claim because Plaintiff had not
18 attained age 22 as of May 11, 2007, the alleged onset date. Tr. 12. At step one, the
19 ALJ found that Plaintiff had not engaged in substantial gainful activity after onset
20 May 11, 2007. Tr. 12. At step two, the ALJ found that Plaintiff has the following

1 severe impairments: morbid obesity; low back pain status post motor vehicle
2 accident; schizoaffective disorder; and personality disorder, NOS. Tr. 12. At step
3 three, the ALJ found that Plaintiff does not have an impairment or combination of
4 impairments that meets or medically equals a listed impairment. Tr. 14. The ALJ
5 then concluded that Plaintiff has the following RFC:

6 ... claimant has the residual functional capacity to perform light work as
7 defined in 20 C.F.R. § 404.1567(b) and 416.967(b) except he can only
8 occasionally climb stairs and ramps, balance, stoop, kneel, crouch or crawl,
9 and never climb ropes, ladders, or scaffolds. He should avoid all exposure
10 to hazards, and have no public interaction, and never or seldom have
superficial (defined as non-cooperative) interaction with coworker[s] and
supervisors. He should deal with things rather than people, and be
essentially isolated. Proximity to others is ok if he is not required to interact
with them and has only occasional supervision.

11 Tr. 15. At step four, the ALJ found that Plaintiff has no past relevant work. Tr.
12 19. At step five, the ALJ found that, considering Plaintiff's age, education, work
13 experience, RFC, and the testimony of a vocational expert, there are jobs in
14 significant numbers in the national economy that Plaintiff could perform, such as
15 housekeeping cleaner, agricultural products sorter, and cafeteria attendant. Tr. 20.
16 On that basis, the ALJ concluded that Plaintiff is not disabled as defined in the
17 Social Security Act. Tr. 20.

18 On September 21, 2015, the Appeals Council denied review, Tr. 1-5, making
19 the Commissioner's decision final for purposes of judicial review. *See* 42 U.S.C. §
20 1383(c)(3); 20 C.F.R. §§ 416.1481, 422.210.

ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying him child's insurance benefits under Title II and supplemental security benefits under Title XVI of the Social Security Act. ECF No. 18. Plaintiff raises the following issues for this Court's review:

1. Whether the ALJ properly weighed the medical opinion evidence;
2. Whether the ALJ fully developed the record; and
3. Whether the ALJ made a proper step five finding.

ECF No. 18 at 2; 6-20.

DISCUSSION

A. Medical Opinion Evidence

First, Plaintiff faults the ALJ for discrediting the opinion of examining psychologist W. Scott Mabey, Ph.D., and examining physician William Shanks, M.D., and for giving more weight to the opinion of reviewing psychologist Joseph Cools, Ph.D., and reviewing physician Darius Ghazi, M.D. ECF No. 18 at 5-18.

There are three types of physicians: "(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant but who review the claimant's file (nonexamining or reviewing physicians)." *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted).

1 “Generally, a treating physician’s opinion carries more weight than an examining
2 physician’s, and an examining physician’s opinion carries more weight than a
3 reviewing physician’s.” *Id.* “In addition, the regulations give more weight to
4 opinions that are explained than to those that are not, and to the opinions of
5 specialists concerning matters relating to their specialty over that of
6 nonspecialists.” *Id.* (citations omitted).

7 If a treating or examining physician’s opinion is uncontradicted, an ALJ may
8 reject it only by offering “clear and convincing reasons that are supported by
9 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

10 “However, the ALJ need not accept the opinion of any physician, including a
11 treating physician, if that opinion is brief, conclusory and inadequately supported
12 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
13 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
14 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
15 may only reject it by providing specific and legitimate reasons that are supported
16 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81
17 F.3d 821, 830-31 (9th Cir. 1995).

18 *1. Dr. Mabee*

19 Dr. Mabee performed a consultative examination in February 2013. Tr. 297-
20 305. He diagnosed schizotypal personality disorder and dysthymic disorder, early

1 onset. Tr. 298-99. Dr. Mabee opined that Plaintiff's symptoms were markedly
2 severe in four areas and moderately severe in two others. Tr. 298. Regarding
3 Plaintiff's functioning, Dr. Mabee specifically opined that Plaintiff was markedly
4 impaired in three areas: (1) the ability to perform activities within a schedule, (2)
5 complete a normal work day and work week without interruptions from
6 psychologically based symptoms, and (3) maintain appropriate behavior in a work
7 setting. Tr. 299. The ALJ gave this opinion little weight. Tr. 18.

8 Because Dr. Mabee's opinion was contradicted by Dr. Cools, Tr. 34-36, the
9 ALJ was required to provide specific and legitimate reasons for rejecting Dr.
10 Mabee's opinion. *Bayliss*, 427 F.3d at 1216.

11 First, the ALJ assigned little weight to Dr. Mabee's opinion because Dr.
12 Mabee's test results were invalid due to Plaintiff's over-reporting of
13 psychopathology. Tr. 13, 18 (citing Tr. 298). The ALJ reasoned that Plaintiff's
14 exaggeration undermined Dr. Mabee's opinion that Plaintiff's functioning was
15 markedly impaired. Tr. 18. An ALJ may discredit a physician's opinions that are
16 unsupported by the record as a whole or by objective medical findings, and an ALJ
17 may permissibly rely on evidence of exaggeration as diminishing the credibility of
18 a claimant's complaints. *See Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d
19 1190, 1195 (9th Cir. 2004); *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir.
20 2001). Here, the ALJ found Plaintiff's profile was invalid due to over-reporting

1 psychopathology. Tr. 18 (citing Tr. 298). For example, the ALJ found that
2 elevated scores on portions of the MMPI-2-RF¹ indicated Plaintiff's profile was
3 invalid due to over-reporting (Dr. Mabee noted that Plaintiff's elevated F-r scale T-
4 score of 120 indicated over-reporting). Tr. 18 (citing Tr. 298). The ALJ further
5 found that Plaintiff's validity scales suggested that he responded "true" to most of
6 the test questions, and Plaintiff's profile could not be interpreted because his scores
7 were likely an exaggeration of his then current psychological functioning. Tr. 18
8 (citing Tr. 298). The ALJ provided a specific reason supported by the record for
9 giving Dr. Mabee's opinion little weight.

10 Second, the ALJ found that Dr. Mabee's opinion provides no objective basis
11 for the limitations assessed. Tr. 18. An ALJ may properly reject an opinion that is
12 unsupported by objective findings. *Batson*, 359 F.3d at 1195. The ALJ found, as
13 noted, that test scores showed Plaintiff exaggerated his symptom complaints, yet
14 Dr. Mabee assessed significant limitations. In addition to this inconsistency, the
15 ALJ found that Dr. Mabee "did not provide any basis for the degree of limitations
16 given." Tr. 18 (citing Tr. 297-305). Similarly, the ALJ found that Dr. Mabee used
17 a check-box form with few objective findings supporting the degree of limitation

18
19 ¹ The Minnesota Multi Phasic Personality Inventory-2 Restructured Form, was
20 published in 2008.

1 assessed. Tr. 18 (citing Tr. 299-301). An ALJ may permissibly reject check-the-
2 box reports that do not contain any explanation of the bases for their conclusions.
3 *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996). This too was a specific and
4 legitimate reason to give Dr. Mabee's opinion little weight.

5 Next, the ALJ gave three reasons for discrediting DSHS evaluations in
6 general. Tr. 18. Plaintiff challenges these general reasons for discrediting the
7 DSHS evaluations, to the extent that the ALJ also relied on these reasons when she
8 gave Dr. Mabee's opinion little weight. ECF No. 18 at 6-12. For example, the
9 ALJ found that DSHS evaluations are largely based on a claimant's self-report, and
10 the ALJ found that Plaintiff's statements were not entirely credible. Tr. 16, 18. An
11 ALJ may discredit an opinion that is based on a claimant's exaggerated or
12 otherwise unreliable self-report. *See Guillen v. Comm'r of Soc. Sec. Admin.*, 2007
13 WL 1454982 at *2, 232 F. App'x 699, 702 (9th Cir. 2007) (unpublished) ("We
14 held that the ALJ's reliance on a testifying physician's opinion over the claimant's
15 treating physician was based on substantial evidence because the claimant's 'self-
16 reports were exaggerated' thus making the treating physician's report likewise
17 unreliable") (citing *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).

18 Plaintiff does not challenge the ALJ's negative credibility finding in this Court,
19 and therefore any challenge to that finding is waived on appeal. *Hughes v. Astrue*,
20 357 F. App'x 864, 866 (9th Cir. 2009) (unpublished) (holding failure to challenge

1 the ALJ's credibility finding in the district court waives any challenge to that
2 finding on appeal). Because there was a lack of supporting objective evidence and
3 Plaintiff over-reported his symptoms on testing, the ALJ's finding that DSHS
4 reports are generally based on a claimant's self-report appears borne out in this
5 case, and on this record is a specific and legitimate reason to discredit Dr. Mabee's
6 opinion.

7 Another general reason the ALJ gave for discrediting Dr. Mabee's opinion
8 is that, because it was rendered for the purpose of determining Plaintiff's eligibility
9 for state assistance, Plaintiff had an incentive to "overstate his symptoms and
10 complaints." Tr. 18. It is well-settled in the Ninth Circuit that the purpose for
11 which medical reports are obtained does not provide a legitimate basis for rejecting
12 them. *See Lester v. Chater*, 81 F.3d 821, 832 (9th Cir. 1995). An examining
13 doctor's findings are entitled to no less weight when the examination is procured
14 by the claimant than when it is obtained by the Commissioner. *Id.* In the absence
15 of other evidence undermining the credibility of a medical report, the purpose for
16 which the report was obtained does not provide a legitimate basis for rejecting it.
17 *Reddick v. Chater*, 157 F.3d 715, 726 (9th Cir. 1998). Moreover, an ALJ "may
18 not assume doctors routinely lie in order to help their patients collect disability
19 benefits." *Lester*, 81 F.3d at 832. To the extent the ALJ relied on the general
20 nature of DSHS evaluations, and an applicant's purported resulting incentive to

1 overstate his symptoms and complaints, the ALJ erred. The error, however, is
2 harmless. The ALJ cited other specific, legitimate reasons supported by substantial
3 evidence (such as Plaintiff's over-reporting and the lack of supporting objective
4 evidence) which support the ALJ's rejection of the opinion. *See, e.g., Morgan v.*
5 *Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 601-02 (9th Cir. 1999). Therefore, the
6 outcome is the same despite the improper reasoning. Errors that do not affect the
7 ultimate result are harmless. *See Parra v. Astrue*, 481 F.3d 742, 747 (9th Cir.
8 2007); *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990); *Booz v. Sec'y of*
9 *Health & Human Servs.*, 734 F.2d 1378, 1380 (9th Cir. 1984). Here, for example,
10 Dr. Mabee's report is also inconsistent with reports by providers that Plaintiff's
11 affect, mood and concentration were generally normal. *See, e.g.,* Tr. 332 (alert,
12 cooperative, normal mood and affect, normal attention span and concentration are
13 noted by Dr. Bala in August 2013); Tr. 336 (same noted by provider in September
14 2013); Tr. 345 (same noted in October 2013); Tr. 349 (same in December 2013).

15 Another general reason the ALJ gave in assigning little weight to these
16 opinions is that DSHS rules governing the definition and assessment of disability
17 differ from those of the Social Security Administration. Tr. 18. The regulations
18 provide that the amount of an acceptable source's knowledge of Social Security
19 disability programs and their evidentiary requirements may be considered in
20 evaluating an opinion, regardless of the source of that understanding. 20 C.F.R. §

1 404.1527. And, the regulations also require that every medical opinion will be
2 evaluated, regardless of its source. 20 C.F.R. § 404.1527(c) and 416.927(c).
3 Although state agency disability rules may differ from Social Security rules
4 regarding disability, it is not always apparent that the differences in rules affect a
5 particular physician's report without further analysis by the ALJ. Here, the DSHS
6 form defines marked as "a very significant limitation on the ability to perform one
7 or more basic work activit[ies]." Tr. 299. As noted in *Steinmetz v. Colvin*, 2016
8 WL 697141 at *5 (E.D. Wa., Feb. 19, 2016), further analysis by an ALJ may be
9 needed where a DSHS form does not define terms. Here, the terms are defined.
10 However, as with the purpose for which the report is created and any purported
11 built-in incentive to overstate complaints, any error by the ALJ in relying on the
12 difference in agency definitions is also clearly harmless because the ALJ's
13 remaining reasons are specific, legitimate and fully supported by the record.

14 Moreover, the ALJ relied on the opinion of testifying psychologist Joseph
15 Cools, Ph.D, and gave his opinion significant weight, as another reason to give Dr.
16 Mabee's opinion less weight. Tr. 17 (citing Tr. 33-36). The opinions of non-
17 treating or non-examining physicians may serve as substantial evidence to reject an
18 examining physician's opinion when it is consistent with independent clinical
19 findings or other evidence in the record. *Thomas v. Barnhart*, 278 F.3d 947, 957
20 (9th Cir. 2002) (citing *Morgan*, 169 F.3d at 600)). Dr. Cools reviewed the record

1 and disagreed with Dr. Mabee's diagnosis of schizotypal personality disorder, and
2 his [rule out] diagnosis of borderline intellectual functioning (BIF). Tr. 13, 17
3 (citing Tr. 33-34, 299). The ALJ credited Dr. Cools' opinion that neither diagnosis
4 is well supported by the record. *Id.* The ALJ further credited Dr. Cools' opinion
5 that schizotypal personality disorder is a "very complicated diagnosis," and
6 typically it is not made until a provider has had an extended period of regularly
7 observing a patient's interaction, a situation which obviously was not possible
8 during a single sixty-minute evaluation. Tr. 17 (citing Tr. 34). An ALJ may reject
9 an opinion that is unsupported by objective findings or by the record as a whole.
10 *Batson*, 359 F.3d at 1995. The ALJ gave a legitimate reason for crediting Dr.
11 Cools' opinion rather than Dr. Mabee's.

12 With respect to Dr. Mabee's rule out diagnosis of BIF, the ALJ further found
13 that there has been no testing of Plaintiff to support this potential diagnosis;
14 moreover, no review of Plaintiff's school records provides a basis for a BIF
15 diagnosis. Tr. 17 (citing Tr. 299). The complete lack of objective findings
16 supporting Dr. Mabee's diagnoses was a specific, legitimate reason to give limited
17 weight to Dr. Mabee's opinion.

18 *2. Dr. Shanks*

19 In February 2013, orthopedist William Shanks, M.D., examined Plaintiff.
20 Tr. 13 (citing Tr. 307-12). Dr. Shanks opined that Plaintiff's lumbar spine

1 condition limited him to sedentary work. Tr. 13 (citing Tr. 311-12). The ALJ gave
2 Dr. Shanks' opinion little weight. Tr. 18 (citing Tr. 312).

3 Because Dr. Shanks' opinion was contradicted by Dr. Ghazi, Tr. 31-32, the
4 ALJ was required to provide specific and legitimate reasons for rejecting Dr.
5 Shanks' opinion. *Bayliss*, 427 F.3d at 12216.

6 First, the ALJ gave Dr. Shanks' opinion little weight because his findings of
7 "slight displacement of [the] S1 nerve root" and "degenerative disc disease
8 significant for his age" are mentioned by Dr. Shanks for the first time in the record;
9 Dr. Shanks opined that Plaintiff's x-ray in 2013 (Tr. 314-15) remained unchanged
10 from the prior one in 2007 (Tr. 266-67), and the ALJ found these findings are
11 completely contrary to all prior exams and testing, which were normal or negative.
12 Tr. 13, 18 (citing Dr. Shanks at Tr. 309). An ALJ may discredit a physician's
13 opinions that are unsupported by the record as a whole or by objective medical
14 findings. *Batson*, 359 F.3d at 1195. An ALJ may credit a nonexamining
15 physician's opinion over that of an examining physician if it is supported by other
16 evidence in the record and consistent with it. *Andrews v. Shalala*, 53 F.3d 1035,
17 1041 (9th Cir. 1995); *Sousa v. Callahan*, 143 F.3d 1240, 1244 (9th Cir. 1998).

18 Here, after reviewing the record, Dr. Ghazi opined that no clear diagnosis of
19 radiculopathy had been made, and he opined the record shows that there had been
20 no definite diagnosis with respect to back pain other than "just low back strain."

Tr. 31; *see also* Tr. 63 (In August 2012, SSA reviewing physician Nathaniel Arcega, M.D., noted that there was no spinal MRI in the record²; merely a reference to one in 2007: “PCP summary of MRI done in 2007 indicated some lower lumbar nerve abutment [but] no protrusions or other abnormalities is not accepted as no [acceptable medical source] reviewed [the] MRI.”).³ Dr. Ghazi further testified that the imaging studies of Plaintiff that are part of the record are typical for people who are morbidly obese. Tr. 17-18 (citing Dr. Ghazi’s testimony at Tr. 31); Tr. 314 (February 2013 MRI showing only minimal to mild findings); *see also* Tr. 63 (exam in July 2012 showed normal range of motion throughout; non-antalgic gait; normal strength and negative SLR); Tr. 13 (citing Tr. 270) (electrodiagnostic studies in July 2008 were normal); Tr. 13 (citing Tr. 251-252) (Dr. Young diagnosed chronic low back pain, without any true clinical objective findings; he found that Plaintiff had no significant physical limitation, and opined that Plaintiff had no physical restrictions that would prevent him from working). Similarly, in January 2012, treatment provider Amanda Baker, CMA,

² An MRI was obtained after Dr. Arcega’s opinion, on February 27, 2013 (Tr. 314).

³ On November 1, 2012, Norman Staley, M.D., affirmed Dr. Arcega’s opinion and observed that there had been no new findings since a “benign CE” was performed by Kenneth Young, D.O. on July 19, 2012. Tr. 71, 79 (referring to Tr. 251-52).

1 noted she gave Plaintiff a referral to physical therapy for complaints of low back
2 pain in November 2011, Tr. 208, but Plaintiff failed to follow through, Tr. 201,
3 further suggesting that back pain symptoms were less severe than alleged.

4 Because Dr. Ghazi's opinion was supported by and consistent with other
5 evidence in the record, this was a specific, legitimate reason to give limited weight
6 to Dr. Shanks' opinion.

7 **B. Duty to Develop the Record**

8 Next, Plaintiff faults the ALJ for failing to develop the record with respect to
9 Plaintiff's mental impairments and limitations. ECF No. 18 at 18-20. An ALJ in
10 a social security case has an independent "'duty to fully and fairly develop the
11 record and to assure that the claimant's interests are considered.'" *Tonapetyan*,
12 242 F.3d at 1150 (citing *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996)).
13 Ambiguous evidence, or the ALJ's own finding that the record is inadequate to
14 allow for proper evaluation of the evidence, triggers the ALJ's duty to "conduct an
15 appropriate inquiry." *Id.* (citations omitted). The ALJ may discharge this duty in
16 several ways, including: subpoenaing the claimant's physicians, submitting
17 questions to the claimant's physicians, continuing the hearing, or keeping the
18 record open after the hearing to allow supplementation of the record. *Id.* (citing
19 *Tidwell v. Apfel*, 161 F.3d 599, 602 (9th Cir. 1998); *Smolen*, 80 F.3d at 1288.

20 Here, this Court finds that the evidence of mental impairment and limitation

1 was not ambiguous nor the record inadequate for proper evaluation of the
2 evidence.

3 Plaintiff did not allege that he was unable to work due to mental limitations.
4 Instead, he alleged that he was unable to work due to bulging discs,
5 herniated/fractured discs, and back issues. Tr. 156. The ALJ found, however, that
6 August 2013 notes by Plaintiff's treating physician, Juan Bala, M.D., show that
7 Plaintiff reported depression and irritability and requested medication. Tr. 13
8 (citing Tr. 330, 332). At step two of the sequential evaluation, the ALJ found that
9 schizoaffective disorder and personality disorder NOS are severe impairments.
10 Tr. 12.

11 The ALJ went on to find that in September 2013, Dr. Bala's records showed
12 that Plaintiff had received no mental health treatment, and had stopped taking
13 Risperidone because he said that it caused hypersomnolence. Tr. 13 (citing Tr.
14 334). The ALJ opined that if Plaintiff's mental health problems were not severe
15 enough to motivate him to pursue treatment, it is difficult to accept his assertion
16 that they are disabling. Tr. 17. The ALJ additionally found that Plaintiff's mental
17 condition improved *without* medication, again indicating lack of significant
18 limitations. Tr. 13 (citing Tr. 346) (symptoms of schizoaffective disorder noted by
19 Dr. Bala to be controlled, even after Plaintiff stopped Risperidone). The ALJ
20 further found that Plaintiff engaged in over-reporting and exaggeration of his

1 mental problems when he was evaluated by Dr. Mabee, also indicating a lack of
2 honesty about his condition. Tr. 16 (citing Tr. 298). The reviewing psychologist,
3 Dr. Cools, found that the record was adequate for him to review and form an
4 opinion of Plaintiff's RFC. Tr. 35-36. Plaintiff complains of "scant evidence," but
5 Plaintiff failed to seek treatment, and it is Plaintiff's responsibility to present
6 evidence to establish disability. Here, Plaintiff has undergone a consultative
7 examination. Another psychologist, Joseph Cools, Ph.D., reviewed the record and
8 testified that Plaintiff was fully able to understand, learn, remember and "carry out
9 simple/routine instructions and attend on a regular basis." (Tr. 36). Dr. Cools
10 opined that Plaintiff was limited to superficial social interaction, as the ALJ
11 assessed in the RFC. Tr. 15 (citing Tr. 36).

12 Because the record was not ambiguous, nor was the evidence insufficient for
13 a disability determination, the ALJ fulfilled her duty to develop the record.

14 **C. Step Five Finding**

15 Plaintiff faults the ALJ for presenting an incomplete RFC to the vocational
16 expert. ECF No. 20. "An ALJ must propound a hypothetical to a [vocational
17 expert] that is based on medical assumptions supported by substantial evidence in
18 the record that reflects *all* the claimant's limitations." *Osenbrock v. Apfel*, 240
19 F.3d 1157, 1165 (9th Cir. 2001) (emphasis added). "If the assumptions in the
20 hypothetical are not supported by the record, the opinion of the vocational expert

1 that claimant has a residual working capacity has no evidentiary value.” *Gallant v.*
2 *Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984). “It is, however, proper for an ALJ
3 to limit a hypothetical to those impairments that are supported by substantial
4 evidence in the record. *Osenbrock*, 240 F.3d at 1165.

5 Here, Plaintiff provides no support for this assertion other than the previous
6 allegation that the ALJ improperly weighed the medical evidence. This Court
7 previously found that the ALJ properly gave little weight to the opinions of Dr.
8 Mabee and Dr. Shanks. Thus, their assessed limitations, unsupported by
9 substantial evidence, were properly excluded from the hypothetical question posed
10 to the vocational expert. Accordingly, this Court does not find error.

11 CONCLUSION

12 After review, the Court finds that the ALJ’s decision is supported by
13 substantial evidence and free of harmful legal error.

14 IT IS ORDERED:

15 1. Defendant’s motion for summary judgment (ECF No. 21) is **GRANTED**.

16 2. Plaintiff’s motion for summary judgment (ECF No. 18) is **DENIED**.

17
18 The District Court Executive is directed to file this Order, enter
19 **JUDGMENT FOR THE DEFENDANT**, provide copies to counsel, and **CLOSE**
20 the file.

ORDER DENYING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT - 22

1 DATED this 29th day of December, 2016.

2 S/Mary K. Dimke
3 MARY K. DIMKE
4 U.S. MAGISTRATE JUDGE
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20